United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-7081

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

13
P/S

CURTIS WARD,

Plaintiff-Appellant,

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF NEW YORK, INC., JAMES MARTIN, JOCAR CAB CORP., COSTELLO CONSTRUCTION COMPANY, INC. and INTERBORO SURFACE COMPANY,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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CURTIS WARD,

Plaintiff-Appellant,

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Docket No. 76-7081

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Defendants-Appellees.

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PLAINTIFF-APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal by the plaintiff from an order denying plaintiff's motion to set aside a jury Verdict as inadequate, and the judgment entered thereon against the defendants, CONSOLIDATED EDISON OF NEW YORK, INC., JAMES MARTIN, JOCAR CAB CORP., and COSTELLO CONSTRUCTION COMPANY, INC. in the sum of $750.00 on a cause of action arising out of personal injuries and medical expenses incurred when a taxi cab in which the plaintiff was a passenger struck steel plates in a highway.

STATEMENT OF FACTS

On February 27th, 1974 while the plaintiff was a passenger in a taxi cab owned by the defendant, JOCAR CAB CORP. and driven by the defendant, JAMES MARTIN, it was caused to stop abruptly when it struck steel plates owned by defendant, COSTELLO CONSTRUCTION COMPANY, INC., a subcontractor for the defendant, CONSOLIDATED EDISON OF NEW YORK, INC., who had a permit to perform work thereat. Upon impact the plaintiff was thrown from the rear-back seat, against the center divider, striking his forehead, nose, mouth, chin and cheek as well as the top of his head. (Pages A-22, A-23).

Shortly thereafter, the plaintiff was taken to French Polyclinic Hospital which hospital record shows that the plaintiff sustained a fracture of the zygomatic bone, multiple abrasions about the nose, a laceration of the upper lip requiring sutures (5-6) and abrasions of the scalp and that he had osteo-arthritic degeneration and multiple discogenic disease affecting the segments between the fifth and seventh cervical vertebrate. (Pages A-43, A-63).

The plaintiff returned to his home in Winnetka, Illinois and was treated by Drs. McKeever, Soper, Davis and at the Evanston Hospital Therapy Center and North West Memorial Hospital. (Pages A-27, A-33, A-57).

Following the accident the plaintiff continued to have pain in his head, neck, mouth and cheek. Prior to the accident he had never experienced any pain in those areas of his body except in the area of the neck. (Page A-31).

With reference to the neck he had last seen a physician in July, 1973 and had been pain-free since that time. (Page A-31).

The plaintiff was unable to resume his employment as Vice-President of Montgomery Ward until two weeks after the accident, the first four to five days having been spent mainly in bed. (Pages A-33, A-36).

The plaintiff's physicians prescribed a series of exercises and medication including an orthopedic device hung on the door with a collar. (Page A-32).

The plaintiff continued to experience pain in his lip and the area of the sutures for over two and one-half weeks and the nose scab lasted approximately one month. (Pages A-40, A-41). The pain in his cheek continued for about six months. (Page A-58).

He continued to experience pain in his neck with the same frequency through September 1974, at which time he continued to see Dr. Davis at the Evanston Hospital and at the doctor's office, was given diathermy, traction and deep heat

massage. The plaintiff was seen by Irving Liebman, an orthopedist on November 11th, 1974 who testified on behalf of the plaintiff. Dr. Liebman testified that on November 11, 1974 the plaintiff had pain in the cervical spine and complained of headaches. Dr. Liebman diagnosed the plaintiff's injuries as follows: (A-47)

(1) Fracture of the left zygomatic bone

(2) A Laceration of the upper lip with a permanent cosmetic deformity

(3) Derangement of the cervical spine aggravating a pre-existing a-symptomatic osteo-arthritis

Dr. Liebman further testified that in his medical opinion the accident of February 27th, 1974 caused an aggravation of the pre-existing osteo-arthritis, which was painless prior to the accident and that the accident was also a competent producing cause of the other injuries. Dr. Liebman further testified that the aggravated condition is pain producing, disabling and will only get worse. (Page A-49). The doctor's bill for his services was $125.00 which he testified was fair and reasonable. (Page A-52).

The defendants offered no medical evidence to contradict the testimony of Dr. Liebman or the findings of the French Polyclinic Hospital record.

The plaintiff continued to experience the pain in his neck to the date of Trial, has a scar on the top of his head, and a scar on his nose and lip. (Pages A-56, A-58, A-59). The plaintiff further testified and it was uncontradicted that he expended the sum of $1,142.00 for medical care and treatment in connection with this accident. (Pages A-59, A-60). The defendants offered no testimony to contravert the medical findings or the expenditures made by the plaintiff. In addition to the French Polyclinic Hospital bill and Dr. Liebman's bill, plaintiff paid:

$ 27.50 to Dr. Davis (Page A-34)
179.50 to Dr. McKeever (Page A-30)
186.00 to Evanston Hospital (Page A-57)
62.50 to North Western Hospital (Page A-57)
37.68 for medication (Pages A-29, A-35)
14.00 for Dr. Soper (Page A-30)
7.95 for cervical collar (Page A-37)

And an additional sum of $282.37 for medical expenses totalling in all $1,142.00. (Pages A-59, A-60).

QUESTION PRESENTED

In this negligence action seeking damages for pain and suffering and medical expenses, should a new Trial be ordered on the question of damages on the grounds that the verdict of the jury below is inadequate?

SUMMARY OF ARGUMENT

1. Since the jury returned the verdict in an amount less than the uncontroverted special damages, it was clearly inadequate, warranting this Appellate Court to set said verdict aside and require a new Trial on the question of damages.

2. Since the jury in respect to the total elements of pain and suffering that were proved and remained unchallenged, apparently did not consider them in the verdict, the inadequate verdict should be set aside and a new Trial ordered on the issue of damages. The jury was apparently swayed and prejudiced by the fact that plaintiff, a Vice-President of Montgomery Ward, is financially wealthy and thus returned an inadequate verdict.

POINT I

SINCE THE JURY RETURNED THE VERDICT LESS THAN THE UNCONTROVERTED SPECIAL DAMAGES, IT WAS CLEARLY INADEQUATE, WARRANTING THIS APPELLATE COURT TO SET SAID VERDICT ASIDE AND REQUIRE A NEW TRIAL ON THE QUESTION OF DAMAGES.

The basic error attributed by the Appellant to the jury verdict below is the fact that the award in the sum of $750.00 was less than the uncontroverted special damages proven by the Appellant. This Appellate Court has the power to set aside the inadequate verdict of the jury. In Calvert v. Katy

Taxi, Inc., 413 F.2d 841 (1969) 2nd Circuit Court of Appeals, this Court held that an Appellate Court may set aside a jury verdict where it is "palpably and grossly inadequate" citing Dimick v. Schiedt, 293 US 474, at 486 (1934); Caskey v. Village of Wayland, 375 F.2d 1004 (2nd Circuit 1967).

"... the verdict was less than the damages actually incurred and proven by undisputed evidence, the situation which should result in a new Trial as to damages ..." Yodice v. Koninklijke Nederlandsche Stoomboot Maat, 471 F.2d 705 (2nd Circuit 1972).

In Miller v. Maryland Cas. Co., 40 F.2d 463 (2nd Circuit 1930) the Court discussed two instances in which an Appellate Court could set aside a jury verdict for damages as inadequate; first, "where the jury gave nominal damages, that is, where they did not attempt to appraise the plaintiff's loss at all", or second, "where their verdict was less than the amount of the loss which the defendant did not dispute".

This view is so overwhelming that American Law Reports Annotated in 20 ALR 2nd Page 276 reports "Cases in which the damages awarded in a personal injury action, amounted to even less than the amount of plaintiff's undisputed medical expenses are not within the scope of this annotation, it being obvious that such verdict is inadequate."

The Appellant in this instant case presents a similarly compelling conclusion that the jury award was inadequate since the sum of $750.00 did not even reimburse the Appellant for the total undisputed medical expenses incurred by him and not placed in issue by the defendants. Cases of this type in which such result was reached are: Rose v. Melody Lane (1951, Cal App) 228 P2d 854; McLendon v. Floyd (1939) 59 Ga App 506, 1 SE2d 466; De Moss v. Brown Cab Co. (1934) 218 Iowa 77, NW 17; Dolen v. Beatrice Restaurant Co. (1939) 137 Neb 247, 289 NW 336; Gilbert v. Lahn (1946) 24 NJ Misc 336, 49 A2d 248; Taylor v. Rounds (1943, Pa) 26 Erie Co LJ 51, affd 349 Pa 157, 36 A2d 817; Sanders v. Brown (1943, Pa) 54 Dauph. Co. 272 Shaff 316; Pascucci v. Yori (1949, Pa) 37 Del. Co. 109, 64 York Leg. Rec. 73; May v. Hahn (1899) 22 Tex. Civ. App. 365, 54 SW 416.

POINT II

SINCE THE JURY IN RESPECT TO THE TOTAL ELEMENTS OF PAIN AND SUFFERING THAT WERE PROVED AND REMAINED UNCHALLENGED, APPARENTLY DID NOT CONSIDER THEM IN THE VERDICT, THE INADEQUATE VERDICT SHOULD BE SET ASIDE AND A NEW TRIAL ORDERED ON THE ISSUE OF DAMAGES. THE JURY WAS APPARENTLY SWAYED AND PREJUDICED BY THE FACT THAT THE PLAINTIFF, A VICE-PRESIDENT OF MONTGOMERY WARD, IS FINANCIALLY WEALTHY AND RETURNED AN INADEQUATE VERDICT.

The second question raised by the Appellant to this Court is that the jury verdict should be set aside since the

jury's award was hopelessly inadequate and did not "attempt to appraise the plaintiff's loss at all." Miller v. Maryland Casualty Co., supra, at page 465.

> "In the present case even though substantial damages were awarded, nevertheless, in respect to elements of damage that were proved and remained unchallenged throughout the Trial, the jury failed in its duty to consider them, and for the most important element of damage i.e. the plaintiff's pain and suffering it is clear that the jury awarded no compensation or at best, that which was merely nominal and so avoided the performance of its positive duty and abused its power." Areisberg v. Walters (6th Cir. (1940) 111 F.2d 595, at Page 597).

It seems permissible to state, on general principles that if a jury awards a plaintiff in a personal injury action only the exact amount of his medical expenses without simultaneously awarding him damages for pain and suffering, where such claim has been made and proven, the verdict should be considered invalid. American Law Reports Annotated 20 ALR 2d Page 276.

While it appears rare for a plaintiff with a verdict in his favor to request a new Trial, it is clear that the same rationale for formulating standards for setting aside jury verdicts on grounds that they are excessive, should be applied to setting aside jury verdicts on the grounds that they are

inadequate. Caskey v. Village of Wayland 375 F.2d 1004 (2nd Circuit 1967).

In the case of Neal v. Mantanuska 165 F. Supp. 785 in an action to set aside a jury verdict awarded in a personal injury action on grounds of excessiveness, the Court set forth the following guidelines in determining whether the award was fair.

(1) The nature and expense of the injuries and losses.

(2) The diminished earning capacity, and consideration to the economic conditions.

(3) Comparison of awards with awards in comparable cases.

It is submitted when this formula is applied to the instant case the jury verdict falls short of meeting the standards which are applicable.

The injuries sustained by this plaintiff were detailed at Trial and the award should have been designed to compensate the plaintiff for the pain and suffering incurred by him among which were the following:

(a) A fracture of the zygomatic bone.

(b) A laceration of the upper lip requiring sutures with a permanent cosmetic deformity.

(c) Multiple abrasions around the nose and scalp.

(d) Derangement of the cervical spine aggravating a pre-existing a-symptomatic osteo-arthritis.

(e) Incapacitated from employment for two weeks.

Common human experience tells us that the pain and anguish suffered by the plaintiff in this instant action was severe as evidenced by the hospital report introduced into evidence and the plaintiff's own testimony of the pain and suffering as well as the testimony of Irving Liebman, M.D.

It is difficult to conceive that the total award of the jury in this instant action showed that the jury considered such pain and suffering and performed its duty in rendering a verdict. The plaintiff's financial position and earnings as Vice-President of Montgomery Ward, apparently influenced the jury in returning the judgment.

Although every case involving permanent injuries differs, adjudicated cases serve to illustrate the inadequacy of the jury award in this instant action requiring this Appellate Court to clearly find that the verdict was "palpably and grossly inadequate", Dimick v. Schiedt, supra.

In Leor v. U.S., 193 F. Supp. 8 (1961 District Court, New York Eastern District), plaintiff sustained a low back sprain and no permanent disability with no effect on his occupation was awarded $4,500.00 plus special damages.

In Piscopo v. U.S., 167 F. Supp. 777 (District Court Eastern District), the plaintiff was awarded $2,500.00 for pain and suffering plus special damages after receiving a scalp

laceration and suffering from headaches, dizziness and a stiff neck.

In Veelik v. Atchinson T. & S. F. Ry. Co., 225 F.2d 53 (U.S. Court of Appeals for the Ninth Circuit) the Court held that $2,000.00 awarded to the plaintiff for pain and suffering for contusions, abrasions and cervical strain which was resolved in one month was adequate.

In Miller v. Inter City Transportation Co. 1961 31 Misc. 2d 777, 221 NYS 2d 433, $4,000.00 verdict for whiplash injury aggravating osteo-arthritic changes and cervical spine and degenerative disc was held not excessive.

In Fields v. Kirdlo 1962, 17 AD 2d 1012, 233 NYS 2d 819, $10,000.00 was awarded to plaintiff for aggravation of pre-existing arthritic condition arising out of a whiplash injury causing strain of cervical spine.

In Laukatis v. Kikta 1959 20 Misc. 2d 449, 189 NYS 2d 673, plaintiff was awarded $1,500.00 for contusions and abrasions with loss of 11 days from work.

In Ortiz-Ortiz v. Carroll Transport, Inc., 1959 28 Misc. 2d 838, 193 NYS 2d 803, the plaintiff was awarded $1,200.00 for general contusions causing pain for a number of months with $34.00 medical.

In Lipman v. U.S. 1963 District Court, New York

206 F.Supp. 258, the plaintiff was awarded $2,500.00 for contusions and cerebral concussion.

In Reynolds v. U.S. 1955 District Court, New York, 127 F. Supp. 373, plaintiff was awarded $1,000 for cut over right eye, sutures, bruised knee, ankle and chest.

In White v. State, 18 Misc. 2d 441, 188 NYS 2d 865, the Court awarded plaintiff $950.00 for laceration of the face, foot and neck.

In Piscopo v. U.S. 1958, District Court, New York 167 F. Supp. 777, the Court awarded plaintiff $7,000 for cervical sprain and scalp lacerations.

In addition the aforementioned inadequacy here is most glittering in that the Trial Court recommended $15,000.00 as the value of the case before the jury returned with its inadequate verdict.

Employing the formula set forth in Neal v. Mantanuska, supra, it is clear that the jury's award in this instant case is so shockingly inadequate as to indicate an attitude totally at variance with a rational analysis of the merits of the instant case with regard to the total uncontroverted medical expenses and special damages incurred and the pain and suffering incurred by the plaintiff.

CONCLUSION

Appellant was awarded a verdict in the sum of $750.00 for damages incurred and pain and suffering as a result of personal injuries sustained. The only medical testimony offered at the Trial, hospital records and plaintiff's medical witness, was uncontroverted.

The plaintiff incurred out of pocket expenses, also uncontroverted, in the sum of $1,142.00, as well as severe uncontroverted personal injuries including a fracture, sutures, and aggravation of a pre-existing arthritic condition. The jury could not have appraised the injuries which plaintiff sustained in view of this undisputed evidence in returning a verdict in the sum of $750.00 which on its face is palpably and grossly inadequate. The jury verdict should be set aside and a new Trial ordered on the issue of damages.

Dated: New York, New York
April 14, 1976

Respectfully submitted,

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Of Counsel.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Milton A. Edness Jr, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1790 Clinton Ave, Bronx, 10457, N. York.

That on the 23 day of April, 1976, deponent personally served the within ~~Plaintiff~~ Appellant's Brief upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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M. A. Edness Jr

Sworn to before me this
23 day of April, 1976
Michael DeSantis

MICHAEL DeSANTIS
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Kenneth G. Kennedy, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1171 Sterling Pl B'klyn N.Y. 11213.

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Allan Feldman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 41-48 40th St L.I.C. N.Y.

That on the 23 day of April, 1976, deponent personally served the within ~~Plaintiff's~~ Appellants Brief upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

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